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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

June 22, 1995

BY HAND DELIVERY

The Honorable Reed E. Hundt  
Chairman, Federal Communications  
Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

Re: Modifications to the Commission's Broadband  
Personal Communications Services Rules  
PP Docket No. 93-253

Dear Chairman Hundt:

I hereby respond to your request for comment on the impact of the Adarand Constructors, Inc. v. Pena decision on the Federal Communications Commission's (the "Commission") Personal Communications Services ("PCS") rules and policies. Although I view the Adarand decision as an unfortunate and misguided development in affirmative action jurisprudence, I believe that the Commission can continue to satisfy its Congressional mandate to disseminate broadband PCS licenses among a wide variety of applicants, within the confines of the Supreme Court's recent determinations, with only minor modifications to its competitive bidding rules.

Under the present competitive bidding structure, minority groups and women are afforded preferences in the competitive bidding process unavailable to other potential bidders in the entrepreneur blocks. These preferences include the availability of specific corporate structures that facilitate access to capital, enhanced bidding credits and installment payment plans, and relaxed affiliation and attribution rules. Throughout the competitive bidding rulemaking proceeding, these incentives were deemed to be essential to the achievement of Congress' goal of encouraging new entry into the telecommunications marketplace and diversifying the class of Commission licensees. In the wake of Adarand, I urge the Commission to expand the availability of these preferences to others participating in the C Block auctions, thereby removing the constitutional cloud that may blanket the Commission's current competitive bidding process.

**Black Entertainment Television, Inc.**

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In an effort to ensure that the auctions can occur in a timely manner and without additional legal controversy, I urge the Commission to eliminate the race and gender-based distinctions drawn in its PCS rules by making the preferences, formerly afforded only to small minority and women-owned entities, available to all small businesses bidding in the entrepreneur blocks. The effect of these rule changes would be to provide incentives to all C Block bidders that satisfy the entrepreneur block financial caps, and provide enhanced benefits to small businesses. Courts have consistently confirmed that there are no constitutional limitations on the Commission's ability to provide distinct preferences to particular classes of bidders based solely on financial considerations.

Accordingly, the Commission should make the 50.1/49.9 percent equity structure, previously available only to minority and women-owned companies, available to all small businesses. Similarly, the Commission should afford all small businesses a 25 percent bidding credit and the additional benefit of paying for their licenses pursuant to the enhanced installment payment plan presently outlined in the Commission's PCS rules.

In implementing these changes, the Commission also must modify slightly its race-based affiliation exemption rule and apply the exemption to all entrepreneur block PCS applicants.<sup>1/</sup> Specifically, the Commission should apply its affiliation exemption rule to individual members of a C Block applicant's control group, regardless of their race, for purposes of determining compliance with the entrepreneur block and the small business financial caps. In order that this provision not create a "loophole," a broadened affiliation exemption should only apply if the gross revenues and total assets of the control group member's individual affiliates also fall below the entrepreneur block financial caps.

The modified affiliation rule would not require the aggregation of the revenues and assets of the affiliate companies in making the entrepreneur block and small business eligibility determinations so long as each affiliate individually qualifies to bid in the entrepreneur block (e.g. each affiliate has gross revenues of less than \$125 million for the past two years and has less than \$500 million in total assets as of the short-form filing date). If any one of the affiliates earned revenues or

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<sup>1/</sup> Under the current rules, an entity controlled by members of minority groups is not considered an affiliate of the applicant if the affiliation arises solely from control of such entity by members of the applicant's control group that are members of minority groups. 47 C.F.R. § 24.720(1)(11)(ii).

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holds assets in excess of the entrepreneur block financial limits, the PCS applicant would be prohibited from participating in the C Block auctions. Consistent with the Commission's policy objectives, the operation of this rule would aggregate and attribute the revenues and assets of entities controlled by members of the control group of a C Block applicant only if the affiliates themselves are large.<sup>2/</sup>

The Commission has already adopted a similar rule for small business consortia. Under the Commission's rules, small businesses can unite and participate in the C Block auctions as a single entity, even if their combined revenues and assets exceed the small business and entrepreneur block financial limits, so long as each member of the consortium qualifies as a small business.<sup>3/</sup> Under the rule proposed herein, the Commission will not cumulate or attribute the revenues and assets of the affiliates of a control group member, for purposes of determining eligibility to bid in the entrepreneur block, or as a small business, so long as each affiliate falls below the entrepreneur block financial limits.

Because affiliates do not hold direct interests in the PCS applicant, as in the case of small business consortia, the Commission should not be concerned that the affiliation exclusion would place small businesses at a disadvantage in the competitive bidding process.<sup>4/</sup> In the small business context, each individual member of the consortium has a direct interest in committing all available resources to the PCS applicant. In the affiliate context, however, the companies controlled by an applicant's control group member have no direct interest in the applicant and therefore will not necessarily provide the PCS applicant with any financial support, or the same level of financial support available from the members of a small business consortium. Accordingly, the rule proposed herein, in

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2/ The rule would continue to exclude the revenues and assets of affiliates, regardless of the basis of the affiliation. For instance, an affiliation created through common management would not be considered in determining compliance with the entrepreneur or small business financial caps if affiliation arises from a member of the control group's directorship of another entity, so long as the affiliate satisfies the financial eligibility requirements of the entrepreneur block.

3/ See 47 C.F.R. § 24.709(b).

4/ Under the Commission's rules, small businesses are defined as entities that have average annual gross revenues for the preceding three years of not more than \$40 million.

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conjunction with the current small business consortium rule, will address the need for greater access to capital shared by all entrepreneur block bidders without disadvantaging any particular group.<sup>5/</sup>

These proposed rule modifications will provide all entities that are under-represented in the telecommunications industry with similar opportunities to participate successfully in the PCS auctions without resort to race or gender-based preferences. The rules will encourage the diverse participation of business men and women who have historically built successful companies and have acquired the expertise necessary to create and manage a successful PCS business. At the same time, the size-based limitations incorporated in the affiliate exclusion rule will prevent wealthy individuals who control large companies to

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<sup>5/</sup> Indeed, if this accommodation is not made, the competitive bidding rules will have the perverse effect of permitting a small business consortium, composed of five \$39 million companies, to participate in the C Block auctions and receive the maximum benefits available to entrepreneur block bidders, while prohibiting an individual's participation in the auction process based solely on his/her disqualifying affiliations. This result plainly would not fulfill Congress' desire to disseminate licenses among a wide variety of PCS applicants and does not reflect a workable definition of a small business post-Adarand.

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establish new corporations for the sole purpose of participating in the competitive bidding process.

I trust that these recommendations will facilitate the commencement of the C Block auctions as well as the full and successful participation of a diverse group of broadband PCS applicants.

Sincerely,

A handwritten signature in cursive script, reading "Robert L. Johnson". The signature is written in dark ink and includes a stylized flourish at the end.

Robert L. Johnson

cc:	The Honorable James H. Quello	William E. Kennard
	The Honorable Andrew C. Barrett	Jackie Chorney
	The Honorable Rachelle B. Chong	Kathleen O'Brian Ham
	The Honorable Susan Ness	Rosalind Allen
	Ruth Milkman	Anthony Williams
	Rudolfo M. Baca	Catherine Sandoval
	Lisa B. Smith	Regina Keeney
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